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THE ROLE OF RULES IN LAW AND MORALITY

by

Frederick S. Carney*

THE PURPOSE of this Article is to contribute to our understanding of morality by examining some formal characteristics morality shares with law. In carrying out this purpose, I shall concentrate upon positive rather than critical considerations. That is, I shall focus attention upon how morality, by analogy with law, actually functions in society, not upon what its ideal content, or the ideal content of law, ought to be. Thus I shall forego in this Article the more usual preoccupation of the ethicist in legal discussions to bring moral considerations to bear upon law, and instead inquire into what may be learned about the general structure of positive morality by applying selected aspects of legal analysis to it.

The basic category that will be employed from law to illumine positive morality is that of a rule. Of course, rules have received considerable attention recently both in moral philosophy and in moral theology. But the discussion of rules in moral philosophy and moral theology has occurred, for the most part, within the context of critical, and not positive, morality. In moral philosophy, an enormous literature has been produced on the subject of rule-utilitarianism.¹ I am not concerned in this Article to discuss the various types of rule-utilitarianism, or to assess the kinds of arguments that can be made for and against its claims. I do want to point out, however, that rule-utilitarianism is not especially interested in illuminating the body of rules that actually exist in society. Rather it concentrates upon a critical theory to the effect that any rule we may wish to consider, whether it exists or not, depends for its justification upon how action governed by it would relate to certain ends or consequences. Thus the rules that it employs are not so much the *de facto* ones of society as *theory-dependent* ones, that is, rules that rest upon and can be inferred from the moral doctrine it recommends. These theory-dependent rules, in the words of David Lyons, "need not be generally observed, acknowledged, accepted, or referred to. They need only be implied or justified by a given moral theory."² I should add that attempts to produce non-utilitarian justification for rules are also, for the most part, operations of critical morality. And so long as non-utilitarians in pursuit of such justification merely substitute for utilitarian notions of ends or consequences such alternative notions as those of fairness, or of "a community of men under

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¹ See, e.g., Brandt, *Toward a Credible Form of Utilitarianism*, in *MORALITY AND THE LANGUAGE OF CONDUCT* 107 (H. Castaneda & G. Nakhnikian eds. 1965); Harrod, *Utilitarianism Revisited*, 45 *MIND* 137 (1936); Urmson, *The Interpretation of the Philosophy of J.S. Mill*, 3 *PHILOSOPHICAL Q.* 33 (1953).

² D. LYONS, *THE FORMS AND LIMITS OF UTILITARIANISM* 146 (1965).

the idea of law," they continue to focus our attention primarily upon theory-dependent rather than de facto rules.³

In moral theology critical considerations in the discussion of rules have also tended in recent years to predominate over positive ones. The issue in this discipline has been drawn around the claims of situationalists and/or contextualists that moral rules either are not possible (because the relevant elements of every truly moral occasion are unique and therefore are not amenable to such classification as rule employment requires), or, though possible, are not desirable (because action according to rules leads to moral legalism and the loss of religious immediacy in moral life).⁴ Against these claims have come rejoinders in defense of rules in religious morality.⁵ I am not interested in this Article in assessing these claims and rejoinders, except inasmuch as they bear directly upon positive morality and for the most part they do not do so.

The distinction I am drawing between the positive and the critical has been more readily acknowledged and employed in legal philosophy than it has in either moral philosophy or moral theology. Jeremy Bentham noted the difference between what he called the province of the expositor and the province of the censor. "To the province of the expositor," he said, "it belongs to explain to us what, as he supposes, the law *is*: to that of the censor, to observe to us what he thinks it *ought to be*."⁶ John Austin observed that "the existence of law is one thing; its merit or demerit another."⁷ The same distinction has been fundamental to the writings of John Gray,⁸ Wesley Hohfeld,⁹ Hans Kelsen,¹⁰ H.L.A. Hart,¹¹ and others who engage in what is now often called analytic jurisprudence.

In recent years, moreover, the idea of a rule as illuminating the concept of law has been given a great deal of attention by writers in analytic jurisprudence. Especially is this true of Hart, who claims that "in the combination of two types of rules (those imposing duties and those conferring powers) lies . . . 'the key to the science of jurisprudence.'"¹²

It does not therefore seem inappropriate to turn to these legal writers, and especially to Hart, to ascertain to what extent the insights they have gained into the role of rules in positive law may also be applicable to the role of rules in positive morality. That they themselves have already made some important applications of their rule analysis to moral philosophy, though evident enough in their writings, should not deter us from further

³ See, e.g., Diggs, *Rules and Utilitarianism*, 1 AM. PHILOSOPHICAL Q. 32 (1964); Rawls, *Justice as Fairness*, 67 PHILOSOPHICAL REV. 164 (1958).

⁴ See, e.g., J. FLETCHER, *SITUATION ETHICS* (1966); P. LEHMANN, *ETHICS IN A CHRISTIAN CONTEXT* (1963).

⁵ See, e.g., P. RAMSEY, *DEEDS AND RULES IN CHRISTIAN ETHICS* (1967); Carney, *Deciding in the Situation: What Is Required?*, in *NORM AND CONTEXT IN CHRISTIAN ETHICS* 3 (G. Outka & P. Ramsey eds. 1968).

⁶ J. BENTHAM, *A FRAGMENT ON GOVERNMENT* 7 (W. Harrison ed. 1948) (emphasis in original).

⁷ J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 184 (H. Hart ed. 1954).

⁸ J. GRAY, *THE NATURE AND SOURCE OF THE LAW* (1909).

⁹ W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTS* (1919).

¹⁰ H. KELSEN, *GENERAL THEORY OF THE LAW AND THE STATE* (1945).

¹¹ H. HART, *THE CONCEPT OF LAW* (1961).

¹² *Id.* at 79.

attempts to explore the manner in which positive morality may be understood, through the idea of a rule, to function somewhat analogously to law. In any event, my reason for believing that the subject matter of this Article is appropriate for the purposes of this journal rests upon the potentialities of this analogy.

There are three basic issues to which I shall hereafter address myself. The first is the nature of rules and their functioning in positive morality. The second is whether rule behavior can be said to fill the entire range of moral action. The third is the conditions under which we can properly say that any particular moral rule actually exists. Each of these issues has been discussed by Hart and others. My analysis will draw heavily upon their published work. But it will also, in each instance, either take issue with them or further develop points that they have made or both.

I. NATURE AND FUNCTION OF RULES IN POSITIVE MORALITY

The idea of a rule is an integral part of wide ranges of human activity. There are rules of games, rules of language, rules of etiquette, rules of clubs or associations, as well as rules of law and rules of morality. In general, it can be said that a rule, at least in the sense I shall be using the term, is a standard the acceptance of which brings the relevant behavior under normative character. It designates a class of actions whose performance is either required, prohibited, or permitted. Thus if one accepts a rule, he is by that acceptance committed to conform his behavior to that specified by the rule.

To be distinguished from behavior according to a rule is behavior that merely has a recognizable pattern to it. Almost all educated Americans read a newspaper daily, but one would hardly say that we are conforming to a social rule in so doing. It is a mere fact of identical behavior. But our driving on the right side of the road in America is not an instance of our conduct just happening to be identical. Rather the existence of a rule of the road is a reason for this particular pattern.

Not only is a rule a reason for action or forbearance, but it also serves as a reason for criticism of our own and others' behavior. Deviations from a rule are considered lapses or faults subject to criticism. One would hardly regard not reading a newspaper today as censorious. But one would disapprove the failure to drive on the right side of the road or to keep a promise that had been properly made. In these instances the existence of rules is a ground for disapproving the conduct.

We may also distinguish between two different ways of conforming to rules, namely, external and internal. In external conformity persons may follow a rule because of inertia, because of desires to avoid penalties or social pressure that disobedience would entail, or because of some personal advantages to be obtained thereby. This external conformity requires mere obedience to the rule for whatever reasons. In internal conformity, however, persons follow a rule because they personally accept it as an appropriate guide for their actions and those of others. It designates a practice

that they are concerned to maintain and perhaps to teach. This internal aspect entails not only obedience to a rule but also acceptance of it. It is evident that a society or group can exist in which a large number of its members conform to its rules only externally. Nevertheless, the society or group could scarcely exist unless some of its members at least have internal conformity with its rules. Furthermore, a healthy society or group will normally have as one of its characteristics the internal acceptance of its rules by a vast majority of its members.

Having made these brief comments on the empirical nature of a rule, I want to turn now to the basic types of rules that are to be found in law and morality. It is at this point that we can observe a very interesting parallel between law and morality. Hart distinguishes two types of rules in law, those imposing duties and those conferring powers. The latter he further delineates into rules conferring *private powers* (to make contracts, enter into marriages, etc.) and rules conferring *public powers* (to enact legislation, adjudicate litigation, etc.). I think it would not be inappropriate to his general understanding of law also to divide his first type of rule into those imposing *determinate duties* (to avoid homicide, report for military service, etc.) and those imposing *indeterminate duties* (to charge a fair rate, exercise due care, etc.). Although Hart calls this latter type a "variable standard," rather than a rule,¹³ it is difficult to see what a variable standard would be within his system unless it were the expression of a kind of rule. It is in this sense that this further delineation of duties is present at least implicitly in his rule theory.

Thus we are in a position to suggest four types of rules in law: those imposing determinate duties, those imposing indeterminate duties, those conferring private powers, and those conferring public powers. I shall look at each of these in turn to inquire into the sense in which it can be said to be present in morality also.

Rules imposing determinate duties are perhaps the most obvious ones in morality. They not only make moral demands upon us, but their central core of obligation is sufficiently clear and fixed that on most occasions in which they function we experience little or no difficulty ascertaining what precise action or forbearance is expected of us. Our moral world abounds with such determinate duties: we ought not to commit murder, we ought not to steal, we ought to keep our promises, we ought to tell the truth, etc. These all seem to be widely-accepted moral rules of society in general. Moreover, particular groups within society may have additional rules of this type that their members are expected to adhere to. These rules may have to do with sexual behavior, gambling, the use of intoxicants, the allocation of personal resources, etc. Rules imposing determinate duties are so evident in positive morality, and so well-acknowledged by moralists, that nothing more need be said about them now.

Rules imposing indeterminate duties, however, while they are often discussed by lawyers in connection with variable standards of due care and

¹³ *Id.* at 130.

fair price, are seldom mentioned by moralists. Yet I think it unquestionable that they actually form a part of our positive morality. For example, while the rule that a husband ought to avoid having sexual relations with anyone except his wife expresses a determinate duty, the rule that a husband, under normal circumstances, ought to have sexual relations with his wife expresses an indeterminate duty. Clearly sexual relations are a duty of marriage, long recognized as such in our morality. But what precisely is required in individual cases? How often should such sexual relations occur to fulfill the duty? In what context? How long ought they to continue in life?

The moral rule requiring sexual relations between spouses is not an isolated instance of indeterminate duty. There are other moral rules as well that also impose this type of duty, such as those requiring that we provide our children a proper upbringing, that we act with gratitude toward our benefactors, that we assist the neighbor who has recently become destitute, etc. What is common to them all is that they leave somewhat open to our discretion and experience the judgment as to what precise actions and forbearances can properly fulfill the demand they place upon us. I say only "somewhat open" for three reasons. First, the variable standard they set forth can be understood to exclude outer fringes of clearly inappropriate conduct. Second, this standard provides a basic criterion for judging from within the circumference of all possible actions those which may be considered to be appropriate. And third, it does leave the actor and his critics with some point of reference for later review and possible criticism of our judgment.

Rules conferring private powers set forth the conditions under which persons may voluntarily extend their duties. Such rules presuppose the existence of common practices within which such powers are operative. In morality we usually think of promising as the classic instance of a practice within which rules conferring private powers operate. But we should also think of marrying, of contracting, and of other forms of agreeing that have moral, and not merely legal, aspects to them. Nevertheless, the making of promises will do to illustrate the type of rules that confer private powers. There are, it would seem, widely-recognized conditions that must be met for one rightly to exercise the power to promise. One must be competent in age and mentality for the promise to be binding, and therefore for it to be a true promise. He must make the promise freely, that is, without physical or undue psychological coercion. And the promise must not be for the performance of an act against public moral policy. These conditions are widely-recognized within the practice of promising, the failure to conform to any one of which serves as a disqualifier of the particular attempt to extend the duties of the would-be promisor and the rights of the would-be promisee. Thus persons may, if they wish, extend the network of their duties (and rights) considerably beyond those determinate and indeterminate ones which mere membership in a society or group requires.

Rules conferring public powers indicate the manner in which designated moral agencies may clarify or revise the moral duties of large groups of people, and how such agencies are to be constituted and operated. The positive morality of some churches and other groups within society includes such rules. For example, the Roman Catholic Church assigns to the Holy Father the power under specified conditions to proclaim and adjudicate moral positions that thereafter are understood to be binding upon members of this church. And some secular communities would seem to lodge in their notables the power to determine the moral practice therein in matters of racial interaction and interfaith relations. I shall discuss this matter at greater length in the third part of this Article.

This four-fold typology of moral rules should help focus attention upon the remarkable breadth of positive morality. It is somewhat unfortunate that most moralists when writing of *de facto* rules limit their discussion to rules imposing determinate duties, occasionally augmented by instances of rules conferring private powers. This has been true even of Hart, who, while finding all four types in the law, found in morality only rules imposing determinate duties and rules conferring private powers. But I have suggested that the analogy of morality with law is considerably more complete than this. And I shall attempt to give further evidence that this is so in the next two parts of this paper.

Before I turn to them, however, I wish to conclude this discussion of the nature of rules and of their functioning with brief comments on two problems of rule employment in positive morality, namely, "borderline cases" and "excusable violations." To say that we know in most instances what conformity to rules requires of us is not to imply that there are not occasional borderline cases in which our obligations and powers are not immediately clear. Such cases may arise because of difficulty in deciding whether a certain kind of conduct is actually that envisaged by the rule or not. We generally know, for example, what promises are, and that we ought to refrain from breaking them. In some instances, however, we may not be sure whether a certain conversation in which we were engaged actually resulted in a promise or not. And thus we are not always clear what is morally expected of us, even according to the rules we embrace. But there is nothing in the nature of rule-conformity that necessitates for its functioning and general viability a complete and mechanical precision. Rules of all four types can function quite effectively with some measure of discretion remaining to persons attempting to apply them in borderline cases, provided that a central core of meaning and application is clear.

Different from borderline cases are those involving what is often called excusable violations of a rule. Here we are concerned with what seem to be obvious transgressions that we may nevertheless condone because of some overriding reason. We may, for example, break a promise to take our family on an outing in order to help a neighbor whose son has just been in an accident. If moral rules were to come equipped with long lists of conditions of application, we should probably be able to consider most cases of

excusable violations as lying outside the force of the rule, and thus to this extent justified. But moral rules are less likely than legal ones to be qualified with a series of qualifications, even those quite specific ones that impose determinate duties. Such heavily-conditioned rule statements would be too complex to be understood by most persons to whom they are to apply, and too complicated to be taught our children in their formative years of moral training. Thus we understandably resort to the shorthand notion of excusable violations. But these seem to be, in fact, the acts that would be justified as not violating the rules if all the conditions of application were to be contained in and transmitted with the rules themselves.

II. THE EXTENT OF RULE BEHAVIOR IN MORAL ACTION

The second major problem of this essay is whether rule behavior can be rightly said to cover the entire range of moral action. Hart believes not. He writes that "obligation and duty are only the bedrock of morality, even of social morality, and there are forms of morality which extend beyond the accepted shared morality of particular societies."¹⁴ This statement refers, of course, to *all* aspects of morality, whether positive or critical, that extend beyond the *social* morality of rules, a somewhat different formulation from mine. But let us look at what he has in mind. He discusses three aspects of morality that extend beyond the social morality of rule behavior with its obligations and duties. The first is what he calls conduct according to moral ideals. The second is moral criticism. But since this seems to refer to critical morality, not to an element within positive morality that extends beyond behavior according to rules, we may dismiss it from our present considerations. The third is private morality, which for the most part he seems to treat as private ideals.

We are left with moral ideals and private morality. And our problem is to ascertain whether either or both point to dimensions of positive morality that extend beyond rule behavior. Hart writes regarding moral ideals that:

[T]here exist side by side with the structure of mandatory moral obligations and duties and the relatively clear rules that define them, certain moral *ideals*. The realization of these is not taken, as duty is, as a matter of course, but as an achievement deserving praise. The hero and the saint are extreme types of those who do *more* than their duty. What they do is not like obligation or duty, something which can be demanded of them, and failure to do it is not regarded as wrong or a matter for censure.¹⁵

I should like to examine a couple of cases in which this is held to be so. Hart himself does not provide them. But he does call attention to an article by J. O. Urmson on saints and heroes that does.¹⁶ Before discussing his cases, Urmson distinguishes between saintly and heroic actions attributable to performance according to moral duty and those attributable to performance according to moral ideals. In the former, he writes, we call a

¹⁴ *Id.* at 177.

¹⁵ *Id.* at 177-78 (emphasis in original).

¹⁶ Urmson, *Saints and Heroes*, in *ESSAYS IN MORAL PHILOSOPHY* 198 (A. Melden ed. 1958).

person saintly or heroic who, either with abnormal self-control or without effort, "does his duty in such difficult contexts that most men would fail in them." But in the latter, we call him saintly or heroic because he "does actions that are far beyond the limits of his duty."¹⁷ Since the former is acknowledged by Urmson to be illustrative, however unusual, of rule behavior, it is to the latter that we need to direct our attention, for it is here that he believes he has found an inadequacy in the classification of all moral actions as obligatory, forbidden, or permitted.¹⁸

His first case is an imaginary, but quite plausible, incident in which a squad of soldiers is practicing the throwing of live hand grenades.

A grenade slips from the hand of one of them and rolls on the ground near the squad; one of them sacrifices his life by throwing himself on the grenade and protecting his comrades with his own body. It is quite unreasonable to suppose that such a man must be impelled by the sort of emotion that he might be impelled by if his best friend were in the squad; he might only have just joined the squad; it is clearly an action having moral status. But if the soldier had not thrown himself on the grenade would he have failed in his duty? Though clearly he is superior in some way to his comrades, can we possibly say that they failed in their duty by not trying to be the one who sacrificed himself? If he had not done so, could anyone have said to him, You ought to have thrown yourself on the grenade? Could a superior have decently ordered him to do it? The answer to all these questions is plainly negative. We clearly have here a case of a moral action, a heroic action, which cannot be subsumed under the classification whose inadequacy we are exposing.¹⁹

On the contrary, there are several ways of looking at this case as one of rule behavior, any one of which would be sufficient to make the action performed by the soldier classifiable as one of duty. First, there are obviously groups within the military in which membership precisely implies accepting such actions when necessary as duties. Certain commando groups specifically require readiness to accept death to save the lives of one's fellows or to insure the success of the mission. In such groups one can properly reproach himself and be reproached by others for failing to perform such a duty. Furthermore, the action can be commanded by a superior.

Second, even apart from special groups within the military in which such action is considered a duty, a soldier can be part of an extra-military group, be it religious or social, in which the giving of one's life is accepted as a duty under some circumstances, such as the saving of the life of another, the avoidance of the infliction of injury, or the refusal to deny one's faith. One can point to the early Christian martyrs, who understood themselves to be part of a community of men acknowledging such duties wherever they may be and holding themselves strictly responsible for their

¹⁷ *Id.* at 201.

¹⁸ For further discussion of non-obligatory moral action, see R. GRICE, *THE GROUNDS OF MORAL JUDGMENT* (1967); Chisholm, *Supererogation and Offence: A Conceptual Scheme for Ethics*, 5 *RATIO* 1 (1963), in *ETHICS* 412 (J. Thomson & G. Dworkin eds. 1968); Feinberg, *Supererogation and Rules*, 71 *INT'L J. OF ETHICS* 276 (1961), in *ETHICS* 391 (J. Thomson & D. Dworkin eds. 1968).

¹⁹ Urmson, *supra* note 16, at 202-03.

performance. One can also point to such present-day phenomena as Quaker hospital units engaged in front-line operations or some non-violent civil rights groups engaged in provocative campaigns which expect sacrifice of this kind if the need should arise.

Third, apart from membership in an actual group, either military or extra-military, in which such duties are expected, a soldier can hold to a private rule that makes such behavior morally non-optional. There is no reason why a personal standard of behavior adopted by an individual, and serving for him as a moral guide, cannot function in the same manner that social rules do, and with the same moral characters of obligation, prohibition, and permission. Of course, his own conscience would have to provide the moral pressure for conformity that for social rules often comes from others. But granting this, another person, having become acquainted with his private rule, could assess whether an action is right or wrong according to it. In this sense, even a private rule has a public aspect.

These are three possible ways of understanding the soldier's deed as an instance of rule behavior, and of avoiding the conclusion that his action was beyond the call of duty whatsoever. Urmson admits that his soldier might understand himself as having an obligation to act as he did. He writes, "I have no desire to present the act of heroism as one that is naturally regarded as optional by the hero, as something that he might not do; I concede that he might regard himself as being obliged to act as he does." But then he adds, wrongly, I believe, that if the soldier "were to survive the action only a modesty, so excessive as to appear false could make him say, 'I only did my duty,' for we know, and he knows, that he has done more than duty requires. Further, though he might say to himself that so to act was a duty, he could not say so beforehand to anyone else, and no one else could ever say it. Subjectively, we may say, at the time of action, the deed presented itself as a duty, but it was not a duty."²⁰

Apparently, what we now have is a case in which Urmson admits that the soldier might well regard this deed as his duty, and nevertheless thinks we should not rightly consider it to be his duty. Why is there this discrepancy? It seems, and here we get to the core of the problem, that an unnecessarily limiting condition is being employed by Urmson (and Hart) in the definition of duty. This condition is that a moral standard must be generally acknowledged throughout a given society to be a rule. They assume that if it is only acknowledged by some group within society, or perhaps only by an individual person, it is not so much a rule as an ideal. And we are not permitted to apply the notions of obligation, prohibition, and permission to it, except perhaps in either a subjective or an analogical sense. But surely this is a piece of unnecessary verbal legislation, for not only does society in general have norms that function as moral rules, such as acknowledged moral claims that we should keep our promises and not tell lies, but also groups within society have norms that function as moral rules, such as claims that their members should give their lives for others under cer-

²⁰ *Id.* at 203.

tain conditions, avoid the use of intoxicating beverages, or even discriminate against persons of another race in favor of one's own. These latter possess all the attributes of positive moral rules that the former do, except the extent of their generality. They may seem odd, or even immoral, to those of us who do not accept them. But this is no reason for failing to acknowledge that they exist as rules in the positive morality of some groups, and as such impose duties upon their adherents.

What perhaps has given rise to this error is the justifiable belief that a duty must be something within the general capacity of those who are expected to conform to it. Thus, to use Urmson's case, it may well be that the action of the soldier is not normally imposed upon all members of the military. But this is no reason for denying that it could be a duty for some persons within the military for whom it is within their capacity to fulfill, and by whom it has been accepted as the morally appropriate thing to do, either through membership in a group expecting such behavior or through an individual's imposing such behavior upon himself.²¹

Urmson's second illustration can be interpreted in the same way as his first, namely, as not demonstrating what he thinks it does. Addressing himself to what he considers to be an instance of saintliness, he says that:

[A]fter Francis of Assisi had finished preaching to the birds on a celebrated occasion his companions gathered around him to praise and admire. But Francis himself was not a bit pleased; he was full of self-reproach that he had hitherto failed in what he now considered to be his duty to preach to the feathered world. There is indeed no degree of saintliness that a suitable person may not come to consider it to be his duty to achieve. Yet there is a world of difference between his failure to have preached hitherto to the birds and a case of straightforward breach of duty, however venial. First, Francis could without absurdity reproach himself for his failure to do his duty, but it would be quite ridiculous for anyone else to do so, as one could have done if he had failed to keep his vows, for example. Second, it is not recorded that Francis ever reproached anyone else for failure to preach to the birds as a breach of duty. He could claim this action for himself as a duty and could perhaps have exhorted others to preach to the birds; but there could be no question of reproaches for not so acting.²²

It is, of course, very easy to respond to Urmson by saying that stranger actions than this have been accepted as duties by organized groups within society, and imposed upon their members. But here again Urmson is unnecessarily limiting the occasions of rule conformity. He writes about Francis of Assisi that "since nobody else can call upon him to perform such an act as they can call upon him to tell the truth and to keep his promises, there is here a most important difference from the rock-bottom duties which are duties for all and from every point of view, and to which anyone may draw attention."²³

To the contrary, members of a group who accept such an action as a duty can certainly call upon him, who is also a member, to follow the rule

²¹ See R. GRICE, *supra* note 18, at 203-04.

²² Urmson, *supra* note 16, at 203-04.

²³ *Id.* at 204.

of preaching to the birds. Moral rules do not depend for their existence upon their imposing "duties for all and for every point of view, and to which anyone may draw attention," although some moral rules do meet these general conditions.

Perhaps a limited analogy with law is appropriate. There obviously are laws that exist for the whole of a national society, even sometimes parallel customs and legislation for the whole of a civilization. But there are also laws of more limited jurisdiction, applying only in one small nation or even in one state or subdivision within a nation. Yet nobody would deny to them the character of law. The analogy is limited because moral groups are not normally geographical in their extensiveness, as legal entities for the most part are. But even here some of the laws of the United States, for example, apply to its citizens traveling or living outside its continental limits, and in this sense operate somewhat like rules of a moral group that apply wherever its members are to be found. The chief point is that the rules neither of law nor of positive morality require as a condition of their existence an applicability coextensive with society at large, although some rules in both law and morality do meet this condition.

As a general conclusion about this matter, it can be said that while rule behavior may not be inclusive of the entire range of positive morality, it nevertheless covers a much wider part of that range than either Hart or Urmson acknowledged. This is true because of the rule-oriented morality of groups and individuals within society as well as of society itself. The claim I am making is that a large part of what Hart and Urmson mean by moral ideals and personal morality is actually the rule conduct of groups and individuals.

What areas of positive morality can we point to that may contain instances of non-rule behavior? There are, I think, two areas. The first is that of the relatively solitary moral act whose occurrence is so rare that one might hesitate to refer to it as governed by a rule. In such instances one probably applies a completely general standard such as love or justice, as the morally controlling feature of the act. It is possible that Urmson's soldier, if he had had time to reflect, would have considered his act in this light. But it is not necessary that he should have done so. As already pointed out, he might also have acted, and more probably did act, in conformity to a rule in the senses already indicated.

The second area in which positive morality might be understood to include actions beyond those of rule behavior is when optimizing requirements are involved. There are moral occasions when one understands himself to be bound to choose the best solution to a problem in which several alternatives are available, for example, when deciding how most beneficially to allocate one's financial contributions to various deserving agencies and individuals or when confronting the moral requirement to vote wisely in an election involving several candidates. Even these occasions can be understood as instances of rule behavior that constitute a variation on the indeterminate duty type. It will be recalled that in such duties one

has a moral demand upon him in the form of a variable standard that makes some kinds of behavior non-optional and yet leaves open to his discretion and experience the decision as to which of several actions or forbearances he will adopt, each of which would acceptably meet the standard. The difference is that we consider the variable standard in such indeterminate duties to require the selection of a single action or forbearance that is judged as optimific within the capacities of the rule follower. Interpreted in this way, we could appropriately say that we have a moral duty to contribute to such and such an agency or to vote for a particular candidate. This has its analogue in the legal world in situations in which public agencies have the duty of deciding which of several applicants for an airline route is best qualified or the duty of allocating cultural funds wisely to various private and public associations. But optimific-rule performance may stretch the notion of a moral rule rather widely. And there may be reasons for thinking of such moral performances, while existing within positive morality, as going beyond the area more usually associated with rule behavior. The problem is basically one of definition and classification.

III. WHEN DOES A MORAL RULE EXIST?

The third part of this Article is devoted to the ontology of rules, or the conditions under which any particular rule can be said actually to exist. Hart has described two kinds of conditions, the presence of either of which is sufficient to enable us to say that a rule exists. The first is that a rule be *efficacious*, that is, that it function as a rule in the lives of persons to whom it applies by serving as a standard that makes some forms of behavior non-optional or that grants power to perform certain actions under given conditions. This existence test is an empirical one. Could an external observer who did not himself accept the rule nevertheless confirm that "as a matter of fact, a given mode of behavior was generally accepted as a standard?" "It is in this way," Hart writes, that we can "interpret and verify the assertion that in England a rule—though not a legal one—exists that we must bare the head upon entering a church."²⁴

The second way in which a rule can be said to exist is for it to be *valid*, that is, for it to be a proper member of a system of rules the existence of which can be empirically verified. In order for a system to exist there must not only be primary rules imposing duties, but also secondary rules of a public sort that "specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined."²⁵ These secondary rules are of three sorts, (1) the rule of recognition, which serves as a criterion for identifying the primary and other, secondary, rules, (2) rules of change, which provide for the introduction, variation, and elimination of primary rules, and (3) rules of adjudication, which enable designated individuals to determine whether primary rules have been broken. To affirm, then,

²⁴ H. HART, *supra* note 12, at 106.

²⁵ *Id.* at 92.

that a given primary rule is valid, as distinguished from efficacious, "is to recognize it as passing the tests provided by the rule of recognition and so as a rule of the system."²⁶ It need not be efficacious if it can be acknowledged as valid according to the rule of recognition. In this combination of efficacy and validity we have, according to Hart, the inclusive conditions of the existence of a rule.

However, in addition to providing this illuminating clarification of rule ontology, Hart also makes the claim that moral rules, by their very nature, exist only by virtue of their efficacy and not at all by virtue of their being valid within a system. And this marks for him a major distinction between law and morality. Most law has both primary and secondary rules, and therefore can be considered to be a system.²⁷ On the other hand, morality has only primary rules, and therefore functions as a set.²⁸ It is this claim that I am now concerned to test.

Let me be doubly sure that I have made clear what the issue at stake is before I proceed further. There are obviously rules of morality (such as that one ought to keep this promise and not tell lies) the existence of which can be positively ascertained by observing that they are generally conformed to. The fact that there are sometimes violations of these rules, and even manifestations of indifference to them, does not in itself keep us from acknowledging that they exist so long as they generally serve as standards of conduct. The determination as to when such rules are so much ignored within a society or group as to be non-existent is something like the problem of ascertaining how many hairs a man must lose to be bald, and need not concern us for present purposes. Our central question is whether there are also primary rules of morality that depend for their existence upon their having been properly established, upheld, or at least clarified by some kind of representative and accepted procedure involving rules of recognition, change, and adjudication. Hart says no. Thus positive morality is understood by him to contain no rules conferring public powers, and thus unlike positive law to operate only as a set and not also as a system.

I should like to look at two instances of positive morality that may call for partial revision of Hart's claim regarding the ontology of moral rules. The first is the positive morality of some churches. I have in mind those churches that have traditionally assumed the responsibility to define and clarify the rules governing some aspects of their members' lives. Perhaps the Roman Catholic Church constitutes the most notable contemporary example. Here is a group spread over many nations whose morality coexists with the morality of society at large and the moralities of many other groups within society. It would not be correct to say of it that its moral rules exist only inasmuch as they are in fact efficacious in the lives of its members. For there is in this group a widely-recognized rule of recognition that designates certain historic documents and traditions that serve

²⁶ *Id.* at 100.

²⁷ The major exceptions for Hart are primitive law and international law.

²⁸ Positive morality is to this extent understood by Hart to be like primitive or international law.

as the final criteria in matters of faith and morals and that point to an organized magisterium whose function it is to clarify and uphold the faith and morals of its members, even to bring moral pressure to bear upon the members to comply with the moral rules of the Church. In this sense there are secondary rules as well as primary ones, and it is meaningful to speak of its rules—such as the one (or ones) on birth control—as valid according to the criteria of the system. One does not have to search out empirically where the rules are in fact efficacious in the lives of the members. They exist by virtue of their being validly proclaimed as rules by the Church according to its accepted procedures. So long as the magisterial authority to define primary rules of morality is accepted by Roman Catholics so long will at least some primary rules of morality exist in Roman Catholicism by virtue of their validity within its moral system.

Carefully to be distinguished from this type of situation is one in which the moral pronouncements of churches, many of them Protestant, are not thought of as binding upon the membership by virtue of their institutional validity, but rather as recommendations to the members for their autonomous consideration and, hopefully, adoption. Such pronouncements may be accompanied by extensive efforts to inform the members about the reasons for them, and to persuade the members to adopt them as their own moral rules. In such situations there are only primary rules, and not also secondary rules, of positive morality.

Also to be noted within church groups is the difference between the legal and administrative aspects on the one hand, and the moral aspects on the other. Churches do conduct what may be called legal and administrative proceedings within their structures, such as the formal validation of marriages, the reception and expulsion of members, the assignment and transfer of clergy, and so forth. But while these often have moral aspects related to them, it is not to them that I am referring when I speak of the rules of some churches functioning as moral systems, for they involve the type of formal proceedings that can more properly be thought of as legal than as moral.

The second instance that may be understood as providing a qualification of Hart's claim that morality involves only primary rules of obligation is that of the manner in which certain moral changes have occurred in local communities. Here I would like to propose, with some tentativeness, Dallas' inauguration of racial desegregation. This community can be generally described as led and directed, at least until quite recently and probably even today, by a rather cohesive body of prominent and dedicated businessmen. When confronted in the early sixties with the spectre of race riots as they were occurring in Little Rock and New Orleans and highly aware of the damage to economic and social life such riots could inflict on Dallas if they were to occur there, these businessmen determined to desegregate Dallas quickly, effectively, and peacefully. Prior to the summer of 1963, Dallas was, for the most part, segregated in fact, and the prevailing positive moral rules were to the effect that it was right that it

should be so. These businessmen consciously decided not to change the law to accomplish this purpose. Rather they decided to employ, among other things, moral means to accomplish their purposes. They understood themselves as having authority to define the moral rules of their community in such matters, and believed that the populace would accept their authority to clarify and change the moral rules pertaining to relations between the races. In this belief they were, I think, proved for the most part correct. The citizens of Dallas did permit them to exercise this function, and thus implicitly acknowledged secondary rules of recognition and change, at least in this area and probably in others, affecting the general life of the community. The result was that within one summer's duration Dallas moved from a community in which it was not morally right to be desegregated to one in which it was not morally right not to be desegregated. The rules of its positive morality were changed in this respect. And to this extent we can say that certain new community moral rules in Dallas were valid according to the rule of recognition even before we got around to verifying that they were efficacious in the lives of the populace.

It is necessary to distinguish the changes in the moral rules that occurred from two other phenomena that took place simultaneously. The first was that Dallas business leaders took administrative actions to integrate the hotels and restaurants, and to upgrade the jobs of Negroes in industrial and commercial enterprises. The second was that these men also attempted to persuade Dallas citizens that the moral changes they were "legislating" were necessary for the good of the community and should be conformed to. But even after we allow for these two kinds of measures taken simultaneously, it can still be said that these leaders did perform as officials within a moral system in which they anticipated and received the acknowledgment of the community that they had the authority to so act.

These are two instances, a church group and a local community, in which not only primary rules of moral obligation, but also secondary moral rules seem to be operative. Others could also be cited. My point is not that positive morality possesses rules conferring public powers, and therefore the quality of a system, to the same extent as does law. Obviously law is much more to be characterized in this way than is morality. My point rather is that positive morality does in some instances possess secondary rules, and therefore that one must sometimes be prepared to determine the existence or non-existence of particular rules in morality by inquiring not only into their efficacy, but also sometimes into their validity.

IV. CONCLUSION

It may be helpful to recall at this point the basic assumption of this Article, which has been that the study of the concept of law may contribute to our understanding of the formal character of positive morality. To proceed on this assumption is to reverse the more usual direction of discussions of the relationships of law and morality. In those discussions the basic issues are more often than not the actual or potential contribu-

tions of morality to law. Here, however, we have been concerned with one of the ways by which law may contribute to morality, namely, by serving as an illuminating analogy for positive morality.

The time has now come to summarize the major findings that have been derived from the application of this analogy to moral practice. The first is that there are four distinct types of rules in positive morality, and that these bear a close resemblance to those found in law. These types are rules imposing determinate duties, rules imposing indeterminate duties, rules conferring private powers, and rules conferring public powers.

The second finding is that rule behavior can be understood to embrace a much wider part of the total range of positive morality than has generally been acknowledged by moralists. This becomes evident when we examine the operation of rules not only in the morality of society at large, but also in the moralities of groups and individuals within society. The analogy of morality with the plural jurisdictions of law has extensive justification here. Two areas within positive morality may, nevertheless, not involve rule behavior. These are the relatively unique actions the unusualness of which does not lend itself readily to rule formulation and the moral optimalization demands sometimes found in morality that require a single best action to be performed which is not usually determinable outside of specific knowledge of particular contexts.

The third finding is that it is not correct to say that positive morality, unlike law, contains only primary and never secondary rules, and that therefore morality has always the quality of a set and never that of a system. Rather it is correct to say that positive morality would seem to have considerably fewer manifestations of secondary rules than does law and therefore functions less often as a system than does law.